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RECOVERY FOR CONSEQUENCES OF AN ACT.

ONE of the surprising facts in the history of our law is the unsettled state of its doctrine with respect to recovery for consequences. This is a fundamental point, both of civil and of criminal liability; volumes have been written about it in the last fifty years, yet we are apparently no nearer an accepted doctrine than we were three centuries ago. Four or five rules have been proposed, discussed, and found inadequate; all of them, in difficult cases, fail even to guide a jury, and no one has prevailed over the others.

The fruitlessness of the discussion seems to indicate one of two things. Either recovery for consequences depends entirely upon a question of fact, must in every case be left to a jury, and can never profitably be determined by the law or predicted by a lawyer; or else, if there is an underlying principle of law, we have not yet sought it in the right way, and must retrace our steps and try again from the beginning. The former opinion has been expressed,[1] but it has found few advocates, and its adoption must surely be a last resort. It remains to start afresh. I do not propose in this article to formulate and attempt to support another alleged rule of law upon the subject, but to point out a new and what seems the right way of starting in order to reach a satisfactory goal.

The false direction first came, I think, from a misconception of the problem. The attempt made was to connect defendant with the result complained of by means of a train of events through which it was thought the active force set in motion by the defendant could be traced. If, according to one form of statement, the result was not a remote consequence, or according to another form, it was the natural or probable consequence of what defendant did, liability for the result was thought to be established. The connection sought was one between the final result and defendant's original act. In seeking this connection the courts (at least in this century) professed to be guided by Lord Bacon's first maxim, "*Causa proxima non remota spectatur.*"

[1] For instance, by a majority of the court (Ladd, J., vigorously dissenting) in Gilman *v.* Noyes, 57 N. H. 627, Smith Cas. on Torts, 18.

A true reading of this maxim, in connection with the examples given by Bacon to support it, indicates quite the contrary course. If the maxim means anything, it is this: that in looking for the cause of a loss, in order to affix liability for it, one cannot go behind the last cause. Only one relation of cause and effect can be shown, — that between the final cause and its immediate effect. Liability for result and responsibility for final cause are inseparable: given either, the other must exist; one wanting, the other cannot exist. To be liable for a loss, the responsibility of defendant for its final cause must be shown, and that alone. So understood, the maxim would be recognized as axiomatic if it had not been obscured by the mistaken discussion.[1]

Assuming the truth of the maxim, two results follow: first, that the direct cause of a result complained of must first be found, when it will appear as a combination of circumstances, of which the loss is the resultant; and the defendant's responsibility for this combination of circumstances must then be directly established, in accordance with some principle which it is the whole object of our study to determine.

It may be asked, What do we gain by this restatement of our problem, since we still have to seek for a principle which seems very much the same as that for which we have always been seeking? This, at any rate, that if the problem is correctly stated, the reasons for its existence and its solution are apparent. But we also get nearer to the defendant when we seek to connect him with the cause instead of the result, and it will probably appear that we thus eliminate a large part of the difficulty; and we do away at once with the consideration of this as a separate class of cases. We treat defendant's responsibility in the same way, wherever the question arises; whether he has set in motion a natural force, an animal, an agent, or an independent person. Let me now formulate the ideas I have put forward and explain my meaning by examples.

1. If one is legally responsible for an act, he is chargeable with the direct results of the act, however surprising.[2]

The simplest case is that of physical force. If I wrongfully bring my hand into contact with another's person or property, I

[1] It is sufficiently clear that if defendant is liable for the result, he must be responsible for the final cause. The converse will be made evident, I hope, by what follows.

[2] This principle was perhaps first pointed out in the brilliant if not altogether sound opinion of Wardlaw, J., in Harrison *v.* Berkeley, 1 Strob. L. 525, Smith

am responsible for whatever results from the wrongful contact. If by a mere unlawful touch I cause death or severe bodily harm to another (by reason, for example, of his delicate state of health), I am liable for the result either civilly[1] or criminally.[2] If I wrongfully cause A to put ketchup in a cask which has contained turpentine (though I do not know and have no reason to suspect that fact), I am responsible for the harm done to the ketchup by the combination.[3] If I throw into the ocean a box belonging to A, which I have every reason to suppose empty, but there is hidden in it a purse of gold which is lost, I am liable for the loss.[4]

2. We mean by an act, in this use of the word, the whole combination of circumstances, the resultant of which is the harm complained of.

In all cases of personal injury or direct injury to property, the act is the physical contact between the person or property injured and the outside force. It is immaterial which element of the combination is the active one. My act is the same, whether I thrust a sharp stick into A, or fix the stick, and cause A to run upon it;[5] whether I pour water over him, or cause him to jump into a river;[6] whether I pack him in ice and salt, or cause him to be exposed to the freezing air;[7] whether I throw him upon a pile of bricks, or by removing a staging cause a load of bricks to fall upon him.[8] My act in these cases is not fastening the stick, inducing the man to jump, turning him out of doors, or removing the staging; it is bringing into contact with the man's body the stick, water, cold air, and bricks respectively. If I so negligently manage a vessel of which I am master as to run down and sink another vessel and drown a passenger in it, my act of injury is not the mismanagement of my vessel, but the fatal contact between the passenger and the ocean. My negligence is important only in determining whether I am responsible for that contact.[9]

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1 Tice *v.* Munn, 94 N. Y. 621; Brown *v.* C. M. & S. P. Ry., 54 Wis. 342; 1 Sedg. Dam. § 112.

2 State *v.* O'Brien, 81 Ia. 88, Beale Cas. Crim. L. 433.

3 Cunnington *v.* Great Northern Ry., 49 L. T. Rep. 392.

4 Eten *v.* Luyster, 60 N. Y. 252, Smith Cas. Torts, 55.

5 See Reg. *v.* Martin, 8 Q. B. D. 54.

6 See Reg. *v.* Pitts, C. & Marsh. 284.

7 See Hendrickson *v.* Com., 85 Ky. 281, Beale Cas. Crim. L. 430.

8 See Reg. *v.* Hughes, 7 Cox C. C. 301, 26 L. J. M. C. 202.

9 See a confusion on this point in the minds of some of the court in Reg. *v.* Keyn, 2 Ex. D. 63, 66, 150, 232; Beale Cas. Crim. L. 897, 915.

But usually the act of injury is more difficult to determine. If the complaint is, for instance, that defendant by personally injuring plaintiff caused him to lose the benefit of a contract he expected to make, this loss of contract is a resultant of two forces, — willingness of A to contract with B, and absence of B. The act of injury is defendant's only if he is responsible for this combination of circumstances; his connection or want of connection with one factor is immaterial. If the complaint is for loss of a contract for the resale of an article at an advanced price, because of defendant's breach of contract to furnish the article, the factors of the combination which caused the loss seem to be the existence of a contract for resale at an advanced price, and inability of the present plaintiff to perform it; the latter factor being composed of two elements, — non-delivery of the goods by defendant, and inability to get them elsewhere. If defendant is to pay damages for the loss, he must be shown to be legally responsible for this combination.[1] If the complaint is of loss of use of a mill because defendant, a carrier, delayed transportation of a piece of machinery, the act of injury is a combination of intention to run the mill, inability to run it without such a piece of machinery, absence of the piece, and inability to get another like it. Defendant must be responsible for the combination of all these circumstances if he is to be made liable for the loss of use.[2]

3. In examining the responsibility for a given result, we must first determine the legal responsibility for the combination which directly led to the result.[3] If responsibility for this combination is fixed upon a defendant, he is liable for the result which follows, however surprising, and however far removed from what was in the defendant's mind at the time the force was set in motion by him.

Defendant rescued one who was imprisoned in a civil suit; he is liable for the amount of the creditor's claim, no matter what it was.[4] Defendant caused water to pour into plaintiff's mine; he is respon-

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[1] See Grébert-Borgnis *v.* Nugent, 15 Q. B. Div. 85; Hinde *v.* Liddell, L. R. 10 Q. B. 265; Elbinger Actien-Gesellschaft *v.* Armstrong, L. R. 9 Q. B. 473; Horne *v.* Midland Ry., L. R. 7 C. P. 583, 8 C. P. 131; Booth *v.* Spuyten-Duyvil R. M. Co., 60 N. Y. 487; McHose *v.* Fulmer, 73 Pa. 363.

[2] See Hadley *v.* Baxendale, 9 Ex. 341, 23 L. J. Ex. 179; N. Y. & C. Mining Co. *v.* Fraser, 130 U. S. 611.

[3] Often called, in scholastic language, *causa proxima* or *causa causans*. I have called it the act of injury.

[4] Kent *v.* Kelway, Lane, 70.

sible for the damage, though he did not know that the place into which the water flowed was a mine.[1] Defendant threw a stone at deceased; the stone unexpectedly hit deceased on the head, and by a singular chance killed him. Defendant is guilty of manslaughter.[2] A pregnant woman was put off a train at the wrong place; she was forced to walk three miles, and the result was a miscarriage. The act of injury consisted in placing the woman where she must walk, and the railroad company being responsible for that is liable for the direct though unexpected result.[3] A railroad train was negligently stopped on a trestle, and the passenger allowed to alight under the supposition that the train had stopped at his station. He fell through the trestle, and suffered an injury which so weakened him that he died of a slight disease contracted before his recovery from the injury. The railroad company, being legally responsible for the combination of injury and disease, is liable for the unusual result.[4]

We see, then, how liability for the result follows from responsibility for its proximate cause. It remains necessary to establish a connection between defendant and the act of injury; but this is to be done upon general grounds of liability. Professor Wigmore has lately suggested certain principles upon which liability for a tort is to be determined.[5] The same principles determine criminal responsibility, and I see no reason to assume that they are not also sufficient to determine the estimation of damages. Let us then see what will result from an application of these principles to our problem.

The defendant's act, in the first instance, consisted in setting some force in motion; and we are to hold him responsible for the act of injury on the ground that this force is a factor of the act. We are to show, then, in the first place, that the act may properly be called defendant's act because of this force which he set in motion; and that being done, we are to show that the defendant is to be held legally responsible for his act.

4. One at least of the factors of the act of injury must in a fair sense be due to the defendant. If the force he set in motion has become, so to speak, merged in the general forces which surround

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[1] Rylands *v.* Fletcher, L. R. 3 H. L. 330, Smith Cas. Torts, 316.
[2] See Holly *v.* State, 10 Humph. 141.
[3] Brown *v.* M. & S. P. Ry., 54 Wis. 342.
[4] Terre Haute & I. R. R. *v.* Buck, 96 Ind. 346.
[5] 8 HARVARD LAW REVIEW, 377.

us, or in the language of Bishop[1] has "exhausted itself" like a spent cartridge, it can be followed no further. Any later combination of circumstances to which it may contribute in some degree is too remote from the defendant to be chargeable to him.[2]

Thus where A gave to B (an innocent party) poison to be administered to C, and B put the poison on a shelf in C's sick-room, where D found it and gave it to C, A is properly chargeable with the administration of it to C. But if B had thrown it on a dust-heap, where E a year afterward had found it and innocently administered it to C, the force of A's act would have been spent before E found the poison, and A would not have been chargeable with the administration to C.[3] A drove B out of a house on a freezing night, and B was frozen; A is responsible only if his force was still active at the time of B's combination with the cold. If B might have found shelter elsewhere, A's act of thrusting B into the cold ceased to be an active agency in keeping him in it; if B chose to stay outside, A's connection with B's subsequent exposure is remote.[4] A knocked B down and was about to renew the attack; B drew his dagger to defend himself; A, in his haste to kill B, stumbled, fell upon the dagger, and was killed. This was not homicide by B *se defendendo;* A alone was chargeable with his own death.[5] The appellee, having succeeded in an appeal of robbery, alleged as an item of damage that he had been shut up in prison for a long time, by reason of the failure of the justices to deliver the jail at the proper time. But it was held that the long imprisonment was chargeable to the justices alone, not to the appellor; and the damages were not allowed.[6]

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[1] Non-Contract Law, § 44.

[2] Conceivably, of course, we might resolve every act of injury into its ultimate human forces, and charge each person who had set one of these forces in motion with his share of the act of injury. This would take us back to Adam in every case. Human knowledge is too small to perform such a task with justice, and time too short for the determination by this method of a single case. For their own protection, and for the security of the public at large, the courts refuse to go so far; beyond a certain point the operation of a force is called remote, and is disregarded. Fleming *v.* Beck, 48 Pa. 309, 313; Squire *v.* W. U. Tel. Co., 98 Mass. 232, 237.

[3] See Reg. *v.* Michael, 2 Moo. C. C. 120, 9 C. & P. 356, Beale Cas. Crim. L. 378. See also to the same effect Carter *v.* Towne, 103 Mass. 507, with which compare an earlier report of the same case, 98 Mass. 567.

[4] Hendrickson *v.* Com., 85 Ky. 281, Beale Cas. Crim. L. 430.

[5] 44 E. 3, 44, pl. 55. See also Hilton's Case, 2 Lew. 214; Reg. *v.* West, 2 Cox C. C. 500; Reg. *v.* Bennett, Bell C. C. 1, 28 L. J. M. C. 27; Reg. *v.* Ledger, 2 F. & F. 857.

[6] 42 Ass. pl. 19.

5. If the defendant contributed to the act of injury, he should be proved responsible for it in law in one of the ways suggested by Professor Wigmore. (*a*) His responsibility may be proved by showing that he intended either the combination or the result. Thus, while A was negotiating trade with natives on the coast of Africa, B fired upon a boat-load of the natives, and thus broke off the trade. This, it was shown, was B's purpose; and he was held liable.[1] So, in the case of poisoning just stated, the defendant was held liable for the administration of poison by D, since he intended that it should be administered, though by another.[2] (*b*) Defendant's responsibility may be proved by showing that he acted at his peril. Thus, where a carrier deviates, he becomes absolutely responsible for the safety of the goods during deviation, and is liable for loss even by act of God.[3] So where one stores water in a reservoir he is responsible for its action, wherever it goes, until its force has become exhausted.[4] Where a landowner employed a competent builder to build him a house, and the builder, unknown to the owner, placed one wall of the house within the highway, the owner is guilty of obstructing the highway.[5] (*c*) Defendant's responsibility may be proved by showing that he acted negligently; that is, that he might reasonably be required to guard against the combination because it was one in which possible danger lurked. This principle has nothing to do with a probable result; defendant need not have been able to foresee any particular result in order to be held negligent. It is the possibility of the act of injury which makes defendant liable. If the force he set in motion was such as to make reasonably possible such a combination of circumstances as did occur, was illegal, and resulted in harm, he is negligent in this sense.

A master sent aloft a seaman whom he knew to be unfit, through illness, to go aloft; the man fell into the sea, and was drowned. The master is liable for the death.[6] The master of a tug-boat struck with

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[1] Tarleton *v.* M'Gawley, Peake, 205. Lord Kenyon said (at p. 208): "Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself had been satisfied."

[2] Reg. *v.* Michael, *supra.*

[3] Davis *v.* Garrett, 6 Bing. 716.

[4] Rylands *v.* Fletcher, L. R. 3 H. L. 330, Smith Cas. Torts, 316.

[5] Wills, J., in Reg. *v.* Tolson, 23 Q. B. D. 168, 173, Beale Cas. Crim. L. 286, 288.

[6] U. S. *v.* Freeman, 4 Mas. 505. This would, it would seem, still be true (in the absence of consent on the part of the seaman), though the master had provided such

his boat the fender of a bridge on which plaintiff was at work; the blow knocked out a brace between two piles, and the piles, coming together, crushed plaintiff between them. The master was liable, though the result of his act could not possibly have been foreseen.[1]

It is negligent to set going any force which according to the ordinary course of nature may bring about the act of injury. One so adjusts himself to the conditions in which he lives as to escape harm from the ordinary forces of nature; and a person who throws him out of adjustment with his surroundings is justly held responsible.[2] Thus where an insurance company became responsible for a fire among electrical machinery, and the fire by melting a connecting wire caused a short circuit, which so increased the speed of the machines as to injure them, it was held that the company must pay for the loss.[3] Where a vessel, having negligently been allowed to strike a shoal, was drifted by the tide against plaintiff's walls, the master was responsible for the collision.[4]

It is otherwise where an extraordinary operation of nature brings about the injury; there is no negligence in not anticipating it. So where a carrier delays the transportation of goods, which are thereupon overwhelmed by a flood, the carrier is not responsible for the loss caused by the flood.[5]

It is evident, however, that a voluntary human act cannot be treated like an act of nature. When an independent human act, subsequent to defendant's last voluntary act, forms one of the factors of the act of injury, the defendant cannot be held responsible on the ground of negligence unless he might have foreseen the other's act. But if he might have foreseen it, he ought to be responsible for the act of injury, even though the subsequent actor was also a voluntary wrong-doer, and was also liable.[6]

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means for rescuing the man, if he fell, that it seemed impossible that he could drown. The negligence consisted in allowing the contact of the seaman with the water, not in causing his death. See also Reg. *v.* Archer, 1 F. & F. 351.

[1] Hill *v.* Winsor, 118 Mass. 251, Smith Cas. Torts, 48. Compare Reg. *v.* Horsey, 3 F. & F. 287; Reg. *v.* Serné, 16 Cox C. C. 311, Beale Cas. Crim. L. 465.

[2] See a clear statement of the reason of this rule in Beven on Negligence, p. 73.

[3] Lynn Gas & Electric Co. *v.* Meriden Ins. Co., 158 Mass. 570.

[4] Romney Marsh *v.* Trinity House, L. R. 5 Ex. 204, 7 Ex. 247, Smith Cas. Torts, 1.

[5] Denny *v.* N. Y. Cent. R. R., 13 Gray, 481; Smith Cas. Torts, 16. But the rule first stated applies if the act of nature were to be anticipated, as a frost in winter. Fox *v.* B. & M. R. R., 148 Mass. 220.

[6] Guille *v.* Swan, 19 Johns. 381; Lane *v.* Atlantic Works, 111 Mass. 136. This appears, perhaps, still more clearly when the two wrongful human acts are concurrent, though the principle is no doubt the same. Mathews *v.* Tramway Co. 60, L. T. Rep.

It is in connection with this principle that notice becomes important. A combination of circumstances which otherwise is most unlikely may be made probable by knowledge of the existence of unusual factors; and one to whom the existence of such factors was known might therefore be bound to guard against an injury for which otherwise he could not be held responsible. In the law of damages this principle is embodied in the so-called "rule in Hadley *v.* Baxendale."[1] A striking case, in which notice was essential, is Com. *v.* Wing.[2] Defendant was shooting wild fowl in a proper place, when he received notice that a girl in a neighboring house was in so peculiar a state of mind that she would be thrown into convulsions at the sound of a gun. Notwithstanding the notice he continued to shoot, and the girl was thrown into convulsions. Defendant was held guilty of a crime. Without notice, the only combination which defendant could foresee was that of the sound of his gun with a human being, — a harmless and legal combination, which he need not guard against. After the notice, he could foresee the combination of the sound of his gun with a diseased mind, and he should have guarded against it.

The remote and the improbable, it must be admitted, are often difficult to distinguish; indeed, what is remote is often also improbable. From this has resulted a confusion of the principles excluding the one and the other. The courts have seldom sufficiently discriminated between them; as, indeed, for the purpose of deciding an individual case it is not usually necessary to do. But the rules are clearly distinct in origin, in reason, and in application, and much confusion in the cases would be avoided by distinguishing them in theory, if not in practice.

It does not fall within my purpose to discuss the time at which the mental state of the defendant must exist. A settlement of the problem will probably furnish a rule in cases of contributory negligence. It seems likely that in the case of torts the defendant's

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47, Smith Cas. Torts, 91. But see Holmes, J., in Hayes *v.* Hyde Park, 153 Mass. 514. Of course the defendant would be responsible, as explained above, irrespective of negligence, if he intended the act of injury to result from the force he set in motion.

[1] 9 Ex. 341, 23 L. J. Ex. 179. The court held in that case that the damages recoverable for breach of contract "should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

[2] 9 Pick. 1, Beale Cas. Crim. L. 119.

responsibility depends upon his intention or his negligence at the last moment when it was possible for him to control the force he had set in motion. If, however, a factor of the act of injury is defendant's breach of contract, it appears to be held that defendant's ability to foresee the combination must exist at the time the contract was made.[1]

J. H. Beale, Jr.

[1] Gee *v.* L. & Y. Ry., 6 H. & N. 211; Booth *v.* Spuyten-Duyvil R. M. Co., 60 N. Y. 487.